was decided on facts which are quite different and on the law then in force in the State of Kedah. It does not appear from the judgment that the learned judge in that case considered the provisions of the Land Code, Cap. 138 of the Laws of the Federated Malay States which are similar to sections 119 and 161 of the Land Code of Sarawak. I refer to sections 96, 118 and 125 of that Land Code. Nor is there any definition of "instrument" in that Code such as is found in the Sarawak Land Code. Nor does the Malayan Land Code contain a section in such wide terms as section 137 which deals with transfers not only of land but of any estate or interest in land. Section 110 of the Malayan Land Code is limited to the transfer of land and land is not defined to include any estate or interest therein. In my opinion, therefore, the law of Sarawak as contained in the Land Code differs in material respects from the law in force in Kedah when the *Eusof Ali* case was decided and this case must be decided on the law as I find it in Sarawak.

I would, accordingly, hold that the assignment, whether it be regarded as having been effected by parol agreement or by the instrument Ex. 12 was ineffectual to transfer Phang Lin's interest in the land to the plaintiff respondents because it was not registered.

The view which I have taken of the matters dealt with above make it unnecessary for me to come to any conclusion as to the appellants' second ground of appeal and I refrain from doing so.

For the above reasons I would allow this appeal and would order that the respondents do pay the costs in this court and in the court below.

Appeal dismissed.

TAN THYE SENG & ANOR. v. PUBLIC PROSECUTOR
PUBLIC PROSECUTOR v. TAN HEAN SENG

[A.Cr.J. (Ong Hock Sim J.) June 15, 1967]

[Penang — Criminal Appeal No. 32 of 1967]

Penal Code ss. 392 & 397 — Robbery — Armed with deadly weapons — Charge — Framing — Consolidation of charges.

Three accused were charged with offences under sections 392 & 397 of the Penal Code. The charge read *inter alia* "and at the time of committing the robbery you were armed with deadly weapons, to wit, a pistol and a kukri knife". On their own pleas of guilty the first two appellants were each sentenced to 3 years imprisonment and 12 strokes of the rattan and the third accused was released on bond for one year in the sum of $1,000 and to be under the supervision of the probation officer.

The facts given by the police did not show which of the three accused was armed with the deadly weapons, the pistol and the kukri.

Held: on the fact of it one of the three accused could not have been armed as there were only two weapons. The prosecution should have clarified for the complainants as to who was armed and with what and framed separate charges in respect of the persons armed with the two weapons and then consolidate the trial with that of the other charged with simple robbery.

Sentence of whipping set aside. In respect of the other accused order of binding over set aside and a sentence of 12 months' imprisonment substituted.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the first two appellants.

Haji Suhaimi bin Dato' Haji Kamaruddin Deputy Public Prosecutor for the respondent.

Ong Hock Sim J.: This is an appeal by the first two appellants against the sentence of 3 years' imprisonment and twelve strokes of the rattan upon their conviction on their pleas of guilty by the learned president, sessions court Penang on an amended charge:—

"That you on the 15th day of February 1967 during the hours of sunset and before the hours of sunrise, to wit, at about 3.55 a.m. at the ground floor of Hotel International, Penang Road, in the District of Georgetown, in the State of Penang, jointly robbed, Chuan Nam Thong of cash $24,881.70 (Malaysian Currency), $1,212 (American currency) and $470 (Republic of Vietnam currency) and at the time of committing the robbery you were armed with deadly weapons, to wit, a pistol and a kukri knife, and you have thereby committed an offence punishable under section 392 and 397 of the Penal Code."

There is also an appeal by the learned deputy public prosecutor in respect of another accused who had been jointly charged with the two appellants and had also been convicted on the same charge on his own plea of guilty, but who was released on bond for one year in the sum of $1,000 and to be under the supervision of the probation officer under section 290 of the Criminal Procedure Code (S.S. Cap. 21) for the like period.

At the very outset, I would quote *Ratanlal's* (20th Edn.) Law of Crimes p. 1009 on section 397:—

"It does not create any substantive offence. It is complementary to sections 392 and 395, which create the substantive offences."

I now read this section:—

"If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon or causes grievous hurt to any person, such offender shall be liable to be whipped with a rattan in addition to any other punishment to which he may be liable under any other section of this Code."

Ratanlal at p. 1013 has this to say:—

"It is necessary to show that at the time of committing robbery the accused was armed with a deadly weapon and not merely that one of the robbers who was with the accused at the time carried one. The words 'offender' and 'such offender' refer only to the persons who are proved to have actually been 'armed with' deadly weapons and not to the others who in combination with such persons have committed robbery or decoity. Section 34 has no application to the construction of this section."

In the present case, the facts given by the police did not show which of the three was armed with the deadly weapons, the pistol and the kukri. The record showed that the clerk and driver were held up by three Chinese armed with a pistol and a kukri. Thus on the face of it one of the three would not be armed as there were only two weapons. The prosecution should have clarified from the clerk and the driver who was armed and with what and framed separate charges in respect of the persons armed with the two weapons and then consolidate the trial with that of the other charged with simple robbery. I do not think it was necessary to invoke section 397 in the present case as the three had been charged under the second limb of section 392, which already provides for whipping for an offence committed between the hours of sunset and sunrise. It has not been shown which of the three had been armed and I do not propose, therefore, to maintain the sentence of whipping that has been imposed on the two appellants. Accordingly I set aside the order sentencing them to 12 strokes of the rattan as violence was not used against anybody in the commission of this robbery. The sentence of 3 years imprisonment is the maximum the sessions court president has power to impose. In the light of the fact that the learned president himself in his grounds of judgment stated that there have been far too many robberies in town these days and I should refrain from interfering with the discretionary powers exercised by him as to the punishment. Accordingly I confirm the sentence of 3 years' imprisonment on the two appellants.

In respect of the other accused I set aside the order of binding over under section 290 of the Criminal Procedure Code and substitute a sentence of 12 months' imprisonment from date of this order.

Order accordingly.

Solicitors: *Lim, Lim & Oon.*

CENTRAL MALAYSIA DEVELOPMENT CO. LTD. v. CHIN PAK CHIN

[O.C.J. (Gill J.) June 20, 1967]

[K.L. — Civil Suit No. 1062 of 1965]

Land Laws — Agreement to sell — Breach of — Claim for damages — Reciprocal promises — Contracts (Malay States) Ordinance, 1950, ss. 52, 53.

The defendant had issued an option for the sale of the lands in question at $1 per sq. ft., but agreed to reduce the sale price by $34,000 provided this amount was added to the usual 10% deposit of the purchase price of a sale. A deposit of $60,000 was therefore made towards the agreed purchase price of $226,903 leaving a balance of $166,903 to be paid on the date of completion. Under the agreement the defendant was to deposit his documents of title with the plaintiffs' solicitors upon the execution of the agreement, but, as three of his titles had been lost and an application of for new titles had been made, only two documents of titles were so deposited. The defendant gave an assurance that he would try his best to get the new titles by the date of completion. The balance of the purchase price was to be deposited with the defendant's solicitors on or before July 31, 1965. Upon such deposit being made the defendant was to execute a valid and registrable transfer and deliver vacant possession of the lands to the plaintiffs. The balance of the purchase price to be deposited with the defendant's solicitors was to be released to the defendant upon registration of the transfer. Between May and September 1965 a number of letters passed between the solicitors for the parties and it was clear from those letters that the defendant was not in a position to give a valid and registrable transfer to the plaintiffs. His solicitors on August 9, 1965 asked for extension of time up to the end of that month which the plaintiffs did not agree. On August 30, 1965 the defendant's solicitors again wrote for extension of time to complete the sale to September 4, 1965. This second request was also refused. On the strength of their agreement with the defendant, the plaintiffs entered into an agreement with one *YKK* on July 22, 1965, for the sale of the same lands at $1.25 per sq. ft. and received a deposit of $10,000. As a result of the defendant's breach of contract, the plaintiffs were unable to complete their sale to *YKK* on or before August 9, 1965 as agreed. They had therefore to refund the deposit of $10,000 and to pay a further sum of $10,000 as damages and compensation.

The plaintiffs had paid the sum of $166,903 to their solicitors on July 24, 1965. In his defence the defendant alleged that the non-completion of the sale was solely and entirely due to the plaintiffs' failure to send this sum of money to his solicitors as provided in the agreement. He relied on section 53 of the Contracts (Malay States) Ordinance and his case was briefly that the plaintiffs were obliged to pay the said sum to his solicitors before there was any obligation on him to execute a transfer and give vacant possession.

Held: (1) where the reciprocal promises by the parties to a contract were to be performed simultaneously the contention that section 57 of the Contracts (Malay States) Ordinance applied must prevail. In this case the plaintiffs had the money so as to be able to perform his part of the bargain, but the defendant was not in a position to give vacant possession on July 31, 1965. The defendant was therefore in breach of the contract and the plaintiff had the right to repudiate, and were entitled to have their money back;

(2) the normal measure of damages is the market value of the property at the contractual time for completion less the contract price. Because of the difficulties in forming an exact estimate of the market value of a piece of land, on which opinions may well differ, the price at which a plaintiff contracts to resell the property, through strictly irrelevant *per se*, has been taken as *prima facie* evidence of the market value. In the absence of any evidence to the contrary the court had no option but to take the price at which the plaintiffs in this case agreed to sell to *YKK*, *prima facie*, to be the market value; the plaintiffs were entitled to a sum of $56,725 as general damages for loss of the bargain, but they were not entitled to their legal and stamp fees incidental to the drawing of the agreement since they would have had to incur all those expenses if they had had the property conveyed to them. They were also not entitled to recover by way of special damages the sum of $10,000 which they had to pay to the sub-purchaser as liquidated damages.

Cases referred to:—

(1) *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078.

(2) *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158.